Dr ST Singam v Lee Siew Leong

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–410 OF 1996
SITI NORMA YAAKOB, AHMAD FAIRUZ AND DENIS ONG JJCA
28 SEPTEMBER 2006

Contract — Written contract — Collateral oral contract — Whether undercounter payment allows for it

Evidence — Documentary evidence — Forgery of document — Unilateral alteration made by tenant without the consent of the landlord — Effect

Landlord and Tenant — Recovery of possession — Notice to quit — Oral agreement — Tenant alleging payment of undercounter money — Whether collateral oral contract — Whether landlord breached any of the terms of such an agreement

This appeal concerned a tenancy dispute. The respondent ('landlord') was the owner of a three storey shop house ('the demised premises'), which he had let out to the appellant ('tenant'). The parties' relationship as landlord and tenant was initially evidenced by a memorandum of understanding dated 26 December 1984 which was superseded by a formal tenancy agreement dated 25 February 1985, ('the first agreement'). At the time of the first agreement, the tenant also made an unrecorded payment of RM48,000 to the landlord this being the first of two such payments, the consequences of which became a bone of contention between the parties. Throughout 1985 there was the dispute over the failure of the landlord to cover the air well and to effect other renovations to the demised premises. By 18 December 1986, the parties appeared to have sorted out all their differences and on that date, they executed a second tenancy agreement ('the second agreement') to replace the first agreement. Upon the execution of the second agreement, on 18 December 1986, the tenant paid up the one year's arrears of rental for the period 1 January 1986 to 31 December 1986. The arrears amounting to RM54,000 were tendered on 20 December 1986, and this was acknowledged by the landlord in a receipt bearing the same date. Three days later on 23 December 1986, the tenant paid another sum of RM9,000 to the landlord, this being advance payment of two months rental for January and February, 1987. This payment too, was not disputed. On the next day, 24 December 1986, the tenant made another unrecorded payment of RM38,000 this being the second of such payments. So in December 1986, the tenant paid a total sum of RM101,000 to the landlord. This was not disputed. Upon expiry of the second agreement, the landlord through his solicitors issued the tenant with a notice to quit giving him one month from the date of the notice to deliver vacant possession. It is the tenant's case that the first unrecorded payment of RM48,000 to the landlord is the commission or inducement to obtain the tenancy of the whole

building and the closing of the air well, so that he, the tenant would acquire a bigger space with which he could sublet for better rent. It is also the tenant's case that the second unrecorded payment of RM38,000 there was a tacit oral arrangement reached between him and the landlord that the tenancy was allowed to run for a further period of three years from 1 March 1987 to 28 February 1990, and during that period, he was also given the option to purchase the demised premises at the agreed price of RM500,000. That oral arrangement has since been documented in the receipt dated 23 December 1986 (D9) wherein particulars of the payment as well as its purpose are clearly set out and defined. D9 was prepared by the tenant wherein the landlord acknowledged receipt of a sum of RM9,000 being advance rentals for January and February 1987, at the rate of RM4,500 per month, paid to him by the tenant. That was as far as what D9 purported to say when the landlord signed it. However the tenant, without the consent and knowledge of the landlord added the fact of the payment of RM38,000 into D9 as well as other details at the convenient spaces in D9 and for this very reason the landlord challenged the legality of D9, to be a forgery. From the oral and documentary evidence, it was clear that as at 24 December 1986, the landlord had received two unrecorded sums of money totaling RM86,000 over and above the sums due under the first and second agreement. The learned trial judge concluded that the RM48,000 was an undercounter payment, he did not proceed further to consider the legal implications of the tenant's conduct in tendering the money and the respondent's conduct in accepting it.

Held, dismissing the appeal:

(1) There is a growing body of authority to say that such undercounter payment allows the existence of a collateral agreement to exist side by side with the main agreement that it supplements or contradicts. In this appeal, the payment does not appear in the first or second agreement (see *Tan Swee Hoe & Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16). If indeed there existed an oral agreement between the parties what in fact were the precise terms of that agreement? The answer lies in the purpose of the payment, namely the inducement to obtain the tenancy of the whole building and the closing up of the air well so that the tenant would acquire a bigger space with which he could sublet for better rent. The tenant succeeded in securing the first term of the oral agreement as the whole building was leased to him (see paras 32–33).

(2) Whilst it is true that the landlord had breached the second term of the oral agreement in that he did not cover the air well, he cannot be faulted as he was not able to get the approval of the relevant authorities to effect such renovations. Despite that failure, he did, at the insistence of the tenant, attempt to renovate the demised premises, but following the complaints of the sub-tenants he was forced to stop such works. Under these circumstances no blame should be attached to the landlord and for this very reason nothing turns on the oral agreement as the landlord cannot be said to have breached any of the terms of such an agreement (see paras 34–35).

(3) When a document or an instrument, on its production, appears to have been altered, it is the general rule that the party offering it in evidence must explain

A the alteration. Any material alteration in a written document or instrument, whether made by a party or a stranger is fatal to its validity, provided it was made after the document was executed and without the privity of the party to be effected by it and with the additional proviso that the alteration was made while the document was in the possession or in the control or the supervision
B of the party seeking to enforce it. As such the law on the material alteration of a document or deed is well settled in that a party who has the custody of an instrument or document made for his benefit is bound to preserve it in its original state and any material alteration of it will vitiate the instrument, if it was done without the consent of the other party. As that had actually taken
C place in this case, the unilateral alteration in itself is sufficient to enable the landlord to treat D9 as being non-binding on him (see paras 40–41).

(4) The existence of an intention to a fraud is essential to the crime of forgery although it is immaterial that no one was in fact deceived. A general intent to commit fraud is all that is required and it is not necessary to show that the
D offender intended to defraud any particular person (see para 46).

(5) The tenant relies on D9 to support his counterclaim, the very same instrument on which he had unashamedly admitted he had added words without the knowledge and consent of the landlord and which have been proven to contain false information. For that very reason the court found no reason to interfere
E with the trial judge's finding that D9 had been forged by the tenant and therefore cannot be relied upon as the foundation of his counterclaim (see para 48).

[Bahasa Malaysia summary

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Rayuan ini berhubung satu pertikaian tentang penyewaan. Responden ('tuan tanah') adalah pemilik kedai tiga tingkat ('premis tersebut'), yang disewakannya kepada perayu ('penyewa'). Hubungan pihak-pihak adalah tuan tanah dan penyewa yang pada mulanya dibuktikan melalui satu memorandum persefahaman bertarikh
G 26 Disember 1984 yang digantikan dengan satu perjanjian penyewaan yang formal bertarikh 25 Februari 1985 ('perjanjian pertama'). Pada masa perjanjian pertama, penyewa telah membuat bayaran yang tidak direkodkan sebanyak RM48,000 kepada tuan tanah ini merupakan bayaran yang pertama dalam dua bayaran sebegini, yang mengakibatkan isu di antara kedua-dua pihak. Pada sepanjangan 1985 terdapat pertelingkahan atas kegagalan tuan tanah menutup telaga udara dan menjalankan
H ubahsuaian di premis tersebut. Pada 18 Disember 1986, pihak-pihak nampaknya telah menyelesaikan perbezaan-perbezaan mereka dan pada tarikh tersebut, mereka melaksanakan satu perjanjian penyewaan ('perjanjian kedua') untuk menggantikan perjanjian pertama. Setelah pelaksanaan perjanjian kedua, pada 18 Disember 1986, penyewa membayar tunggakan sewa setahun dari tarikh 1 Januari 1986 sehingga
I 31 Disember 1986. Tunggakan tersebut berjumlah RM54,000 dan diberikan pada 20 Disember 1986, dan ini diakui oleh tuan tanah melalui satu resit dengan tarikh yang sama. Tiga hari kemudiannya pada 23 Disember 1986, penyewa membayar jumlah RM9,000 kepada tuan tanah, ini merupakan bayaran pendahuluan untuk sewa dua bulan pada Januari dan Februari 1987. Bayaran ini juga tidak dipertikaikan. Pada keesokan hari, 24 Disember 1986, penyewa telah melakukan satu lagi bayaran

yang tidak direkodkan sebanyak RM38,000 ini merupakan bayaran kedua bayaran sebegini. Dengan itu pada Disember 1986, penyewa telah membayar jumlah RM101,000 kepada tuan tanah. Ini tidak dipertikaikan. Selepas tamatnya perjanjian kedua, tuan tanah telah melalui peguamcaranya mengeluarkan satu notis keluar kepada penyewa memberikannya satu bulan dari tarikh notis tersebut untuk menyerahkan milikan kosong. Adalah kes penyewa bahawa pembayaran pertama yang tidak direkodkan berjumlah RM48,000 kepada tuan tanah adalah komisyen ataupun pendorongan untuk memperolehi penyewaan keseluruhan bangunan tersebut dan untuk menutup telaga udara, supaya dia, penyewa akan dapat memperolehi ruang yang lebih besar di mana dia dapat menyewakan pula untuk sewa yang lebih baik. Adalah kes penyewa juga bahawa bayaran kedua yang tidak direkodkan berjumlah RM38,000 terdapat suatu perjanjian lisan termaklum yang dicapai di antaranya dan tuan tanah di mana penyewaan dilanjutkan untuk jangkamasa tiga tahun lagi dari 1 Mac 1987 sehingga 28 Februari 1990, dan pada masa tersebut, penyewa akan diberi opsyen untuk membeli premis tersebut pada harga yang dipersetujui iaitu RM500,000. Perjanjian lisan tersebut direkodkan pada resit bertarikh 23 Disember 1986 (D9) di mana butir-butir bayaran bersama tujuannya dinyatakan dengan jelas. D9 disediakan oleh penyewa di mana tuan tanah mengakui menerima jumlah RM9,000 yang merupakan pendahuluan untuk sewaan Januari dan Februari 1987, pada kadar RM4,500 sebulan, dibayar kepadanya oleh penyewa. Setakat itulah yang dicatat di D9 apabila tuan tanah menandatanganinya. Akan tetapi, penyewa, tanpa kebenaran dan pengetahuan tuan tanah menambahkan fakta bayaran RM38,000 ke dalam D9 bersama dengan butir-butir lain di ruang-ruang D9 dan atas alasan ini tuan tanah mencabar kesahihan D9, sebagai satu penipuan. Dariketerangan lisan dan dokumentar, adalah jelas bahawa setakat 24 Disember 1986, tuan tanah telah menerima dua bayaran yang tidak direkodkan berjumlah RM86,000 atas bayaran yang kena dibayar di bawah perjanjian pertama dan kedua. Hakim yang bijaksana memutuskan bahawa RM48,000 adalah bayaran di bawah kaunter, beliau tidak selanjutnya mempertimbangkan implikasi undang-undang kelakuan penyewa dalam memberikan wang tersebut dan kelakuan responden dalam menerimanya.

Diputuskan, menolak rayuan tersebut:

(1) Terdapat autoriti yang kian meningkat yang menyatakan bahawa bayaran di bawah kaunter membenarkan kewujudan satu perjanjian kolateral yang wujud bersampingan dengan perjanjian utama yang disokong atau disangkalnya. Di dalam rayuan ini, bayaran tidak dapat dilihat di perjanjian pertama ataupun perjanjian kedua (lihat *Tan Swee Hoe & Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16). Jika benarnya terdapat perjanjian lisan di antara pihak-pihak apakah sebenarnya terma-terma yang nyata perjanjian tersebut? Jawapannya bergantung kepada tujuan bayaran tersebut, iaitu dorongan untuk memperolehi penyewaan keseluruhan bangunan dan menutup telaga udara supaya penyewa dapat memperolehi ruang yang lebih besar di mana dia dapat menyewakan pula untuk sewa yang lebih baik. Penyewa berjaya mendapatkan terma pertama perjanjian lisan tersebut oleh kerana keseluruhan bangunan disewakan kepadanya (lihat perenggan 32–33).

(2) Sementara ia adalah benar bahawa tuan tanah telah memungkiri terma kedua perjanjian lisan tersebut iaitu dia tidak menutup telaga udara tersebut, dia tidak boleh dipersalahkan oleh kerana dia tidak dapat memperolehi kebenaran badan-badan yang relevan untuk membenarkan ubahsuaian tersebut. Walaupun gagal, dia telah, atas desakan penyewa, cuba mengubahsuaikan premis tersebut, tetapi berikutan dengan aduan daripada penyewa-penyewa kecilnya, dia terpaksa memberhentikan kerja-kerja. Di dalam keadaan itu, tuan tanah tidak boleh dipersalahkan dan atas sebab ini tiada apa yang dapat diperolehi daripada perjanjian lisan tersebut oleh kerana tuan tanah tidak dapat dikatakan memungkiri sebarang terma-terma perjanjian tersebut (lihat perenggan 34–35).

(3) Apabila sesuatu dokumen ataupun instrumen dilampirkan, dan nampak seperti telah diubah, adalah peraturan am bahawa pihak yang menawarkannya sebagai bukti mesti menjelaskan pengubahan tersebut. Sebarang pengubahan yang material dalam suatu dokumen atau instrumen, sama ada oleh satu pihak ataupun orang asing adalah mudarat akan kesahihannya, sekiranya ia diubah selepas dokumen tersebut dilaksanakan dan tanpa priviti pihak yang melaksanakannya dan dengan proviso tambahan, pengubahan itu dilakukan ketika dokumen berada dalam jagaan atau kawalan atau pengawasan pihak yang ingin menguatkuasakannya. Dengan itu undang-undang berhubungan dengan pengubahan material sesuatu dokumen atau surat ikatan adalah tetap di mana pihak yang mempunyai jagaan surat ikatan atau dokumen yang dibuat untuk manfaatnya adalah terikat untuk mengekalkannya dalam keadaan asalnya dan sebarang pengubahan yang material akan menjadikan instrumen tersebut tidak sah, sekiranya ia dibuat tanpa kebenaran daripada pihak yang satu lagi. Oleh kerana perkara sebegini berlaku dalam kes ini, pengubahan satu pihak sendirinya adalah mencukupi untuk membolehkan tuan tanah menganggap D9 sebagai tidak mengikatnya (lihat perenggan 40–41).

(4) Kewujudan satu hasrat melakukan fraud adalah penting dalam jenayah penipuan walaupun ia tidak penting tiada siapa yang sebenarnya ditipu. Satu hasrat am untuk melakukan fraud adalah segala yang diperlukan dan ia tidak perlu untuk menunjukkan bahawa pesalah berhasrat untuk menipu seseorang (lihat perenggan 46).

(5) Penyewa bergantung pada D9 untuk menyokong tuntutan balasnya, instrumen yang dia mengakui telah menambahkan perkataan-perkataan tanpa pengetahuan atau kebenaran tuan tanah tersebut dan di mana telah dibuktikan mengandungi keterangan palsu. Atas alasan itu, mahkamah mendapati tiada sebab untuk campur tangan dengan keputusan hakim perbicaraan bahawa D9 telah dipalsukan oleh penyewa dan dengan itu tidak boleh digantung sebagai asas tuntutan balasnya (lihat perenggan 48).]

Notes

For a case on forgery of document, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 1192.

For a case on notice to quit, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) para 1299.

For a case on written contract generally, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 4926.

Cases referred to

Tan Swee Hoe & Co Ltd v Ali Hussain Bros [1980] 2 MLJ 16 (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92

Appeal from: Civil Suit No 22–346 of 1992 (High Court, Shah Alam)

Dato' Dr Cyrus Das (P Mithran with him) (Dass Jainab & Assosciates) for the appellant.
B Thangaraj (Thangaraj & Assosciates) for the respondent.

Siti Norma Yaakob JCA (now CJ (Malaya), delivering judgment of the court):

[1] This appeal concerns a tenancy dispute and in substance the cause of action is founded on the following facts.

[2] The respondent is the owner of a three storey shop house with a penthouse known as No 15, Jalan 14/20 Petaling Jaya, Selangor ('the demised premises'), which he had let out to the appellant. For the purpose of this judgment, I shall refer to the appellant and the respondent as the tenant and the landlord respectively.

[3] The parties' relationship as landlord and tenant was initially evidenced by a memorandum of understanding, if I may call it that, dated 26 December 1984, wherein the landlord acknowledged:

(i) the receipt of RM6,000 from the tenant, being the deposit for one month rental of the ground and first floors of the demised premises;

(ii) that a formal tenancy agreement for a period of two years would be executed between them to take effect from 1 March 1985;

(iii) that the tenant had the option to renew the tenancy upon expiry, for five-year terms every five years with a new rental to be adjusted at current market price;

(iv) that maintenance of the structural walls, electrical wiring and water connection was to be his sole responsibility;

(v) that the second and third floors of the demised premises would not be rented for any medical or dental practice;

(vi) that the air well of the demised premises between the first and second floors would be closed by 1 March 1985 and this would be his sole responsibility.

(vii) that in the event of a sale of the demised premises, the tenant would be given the first option to purchase it at market value.

[4] This memorandum of understanding was superseded by a formal tenancy agreement dated 25 February 1985 ('the first agreement') executed by the parties. Clause 1 sets out the period of the tenancy to be two calendar years beginning from 1 March 1985, at the monthly rental of RM5,500 payable by the 30th day of each

A month. Other clauses include at cl 4(b) the option to renew the tenancy every five years upon expiry of the two years with the rental adjusted to current market value, the first option to purchase at cl 4(c) and the landlord's covenant to cover up the existing air well and matters related to it at cll 3(e), (f) and (g).

B **[5]** At the time of the first agreement, the tenant also made an unrecorded payment of RM48,000 to the landlord this being the first of two such payments, the consequences of which became a bone of contention between the parties and which I shall deal with later in this judgment.

C **[6]** The tenant, a dentist by training, occupied the first floor of the demised premises which he had turned into a dental clinic and surgery and subletted the other floors and the penthouse to a number of sub-tenants.

[7] Relationship between the parties soured soon after the tenant moved into the demised premises. Throughout 1985 there was the dispute over the failure of the
D landlord to cover the air well and to effect other renovations to the demised premises. There was evidence to show that the local authorities did not approve the landlord's plans to cover the air well. Despite this and due to the tenant's insistence, the landlord carried on with the air well renovation but he had to stop when the sub-tenants complained that the construction works disturbed their quiet enjoyment
E of the demised premises and affected their businesses. Because renovations could not be done, the rental was orally agreed to be reduced from RM5,500 to RM4,500 per month right from the start of the tenancy. Even with this concession, the tenant withheld payment of rentals for 1986 and this led to the landlord filing distress proceedings against him for arrears of rental. To settle the matter, the parties negotiated to end all their differences and this include negotiating for an extension
F of the tenancy from two to three years but when the landlord demanded that the rental for the third year be fixed at RM7,500 per month, the tenant was not agreeable and negotiations broke down because of this.

G **[8]** By 18 December 1986, the parties appeared to have sorted out all their differences and on that date, they executed a second tenancy agreement ('the second agreement') to replace the first agreement which had only two months left before the tenancy expired.

[9] Clause 5 of the second agreement identifies the status of that agreement to be
H as follows:

> This agreement supersede the agreement signed between the landlord and the tenant dated 25 February 1985 or whatever document in relation to the leasing of the demised premises.

I **[10]** In substance the second agreement contained almost identical terms as those provided in the first agreement for example cl 1(a) settled for a two year tenancy to run from 1 March 1985, until 28 February 1987, at a monthly rental of RM4,500. The two options remained intact at cll 4(b) and (c) although the period of the tenancy upon renewal is reduced to three years. Likewise, the landlord's covenant to maintain the structural walls, electrical wiring, water connection at cl 3(d), together

with the covenant to repaint the premises at the end of every lease. There is however no mention of the landlord's covenant to cover the air well as provisions similar to cll 3(e), (f) and (g) in the first agreement do not appear in the second agreement.

[11] Upon the execution of the second agreement, on 18 December, 1986, the tenant paid up the one year's arrears of rental for the period 1 January, 1986, to 31 December, 1986. The arrears amounting to RM54,000 were tendered on 20 December, 1986, and this is acknowledged by the landlord in a receipt bearing the same date. Three days later on 23 December 1986, the tenant paid another sum of RM9,000 to the landlord, this being advance payment of two months rental for January and February 1987. This payment too, is not disputed. On the next day, 24 December 1986, the tenant made another unrecorded payment of RM38,000 this being the second of such payments, the first being the RM48,000 paid earlier in February, 1985. So in December 1986, the tenant paid a total sum of RM101,000 to the landlord. This is not disputed.

[12] On 19 February 1987, just ten days before the tenancy was to expire, the landlord submitted plans for covering the air well and other renovations to be done at the demised premises to the tenant for the latter's approval. It would appear that despite the second agreement being silent on this, the landlord was still prepared to be bound to his covenant to cover the air well. The tenant accordingly gave his approval.

[13] Come 2 March 1987, and upon expiry of the second agreement, the landlord through his solicitors, Messrs ST Low & Co issued the tenant with a notice to quit giving him one month from the date of the notice to deliver vacant possession. Responding to the notice, the tenant by his letter dated 5 March 1987, contended that by accepting the RM38,000 unrecorded payment on 24 December 1986, there was a tacit oral arrangement between them that the tenancy was to continue for another three years until 28 February 1990. The landlord was also reminded of his failure to cover the air well and to effect the other agreed renovations since December 1984, resulting in financial loss to the tenant as he was not able to sublet the first and second floors of the demised premises. In a subsequent letter dated 10 March 1987, pertaining to the same notice, the tenant then gave notice to the landlord to start the proposed renovations immediately failing which he would undertake to do them and bill the landlord accordingly.

[14] Through his letter dated 12 March 1987, the landlord denied there had been any renewal of the tenancy after its expiry on 28 February 1987, and that eviction proceedings would follow should the tenant persist in holding over as a trespasser after the expiry of the notice to quit dated 2 March 1987.

[15] The tenant disregarded the notice to quit and continued staying on the demised premises as he had taken the stand that the tenancy had been renewed to expire on 28 February 1990, upon the payment and acceptance of the RM38,000. He also withheld paying any rental since March 1987. This led to the landlord filing

proceedings leading to this appeal seeking principally vacant possession of the demised premises and mense profits. The writ and statement of claim was filed on 18 July 1987.

[16] In his amended statement of defence and counterclaim dated 2 October 1987, the tenant avers again to the payment of RM38,000 as advance rentals for a new tenancy for a fixed term of three years effective from 1 March 1987 to 28 February 1990, together with an option to purchase the demised premises at the agreed price of RM500,000. As this payment and option to purchase are acknowledged by a receipt dated 23 December 1986, the tenant seeks to enforce the receipt by counterclaiming for:

(i) a declaration that the receipt constitutes a binding agreement.

(ii) specific performance of such an agreement.

(iii) damages following the landlord's breach of his covenant to effect the necessary renovations to the demised premises.

[17] Between October 1987 to April 1990, both parties assumed a stand off position each waiting for the outcome of their respective claims in the pending suit. Then on 23 April 1990, whilst the suit was still pending, the landlord issued a second notice to quit, the contents of which were identical to the first notice, issued three years earlier. The tenant was also threatened with legal proceedings, even though such proceedings had already commenced in 1987.

[18] The parties then entered into discussions for a possible sale of the demised premises sometime in April/May 1990. At the same time in response to the second notice to quit, the tenant, by his solicitor's letter dated 21 May 1990, reminded the landlord of his counterclaim for specific performance of an option to purchase the demised premises at RM500,000 which he had already exercised on 7 February 1990. As a sign of good faith the tenant also tendered a cheque for RM50,000, representing 10% of the purchase price of the demised premises, pending the execution of the sale and purchase agreement, a draft of which had already been forwarded to the landlord on 7 February 1990, for approval. The tenant again reiterated that since he had already made a lump sum payment of RM38,000 by way of rental for three years, the second notice to quit was bad in law.

[19] In his reply dated 1 June 1990, the landlord refused for the first time to accept the tenant's exercise of the option to purchase or any proposition for settlement of their dispute. That was the situation when the trial proceeded in the court below and after a 21 day hearing, the learned judge made the following orders.

(i) Dismissed the tenant's counterclaim with costs.

(ii) Allowed the landlord's claim and ordered the tenant to deliver vacant possession of the demised premises to the landlord forthwith. Vacant possession is however confined to the first floor and the penthouse as the landlord had since regained possession of the ground and second floors.

(iii) The tenant to pay RM219,824.00 to the landlord as damages by way of rental for March 1987, and mense profits thereafter with interest at 8% per annum from the date of judgment to the date of realization.

(iv) By consent Messrs Abdul Aziz, Ong & Co pay to the landlord the accumulated sum representing 32 months rental for the ground floor with all interest accrued, held by them as stakeholders.

The circumstances leading to this order were that after 1 March 1987, a dispute arose as to who should collect the rentals of the ground floor which had been subletted. The matter was resolved when both the tenant and the landlord agreed to let the sub-tenant deposit the rentals with her solicitors as stakeholders. Since the tenant has been held to be a trespasser after 1 March 1987, the rentals with interest accumulated held by the stakeholders were ordered to be paid out to the landlord.

[20] In his lengthy judgment, the trial judge made a number of findings, mostly findings of fact and Dato Dr Cyrus Das, learned counsel for the tenant was quick to assure us that he was not appealing to have such findings reversed. On the contrary, he accepted them to have been properly determined based on the evidence, both oral and documentary. However he did question one finding that additions made on three receipts were made unilaterally without the consent or knowledge of the landlord. This, Dato Dr Cyrus Das maintained, runs contrary to the contemporaneous events and the probabilities of the case. More of this later.

[21] From a reading of the judgment itself, we cannot help but conclude that the trial judge was hard put by the very manner the evidence was unfolding before him as he was doubtful whether both parties had been honest and above board in their dealings with each other and frank and truthful when it came to giving their testimony in court. If only there was some degree of candidness on both sides, the task of the trial judge would have been that much easier.

[22] Be that as it may, from the strenuous arguments put forward before us by both Dato Dr Cyrus Das, learned counsel for the tenant and Mr Thangaraj, learned counsel for the landlord, we frame the following two broad issues for our determination:

(i) what is the status of the two unrecorded payments of RM48,000 and RM38,000 and whether in law they create any legal obligations on the part of the tenderer, the tenant and the recipient, the landlord? and

(ii) whether the addition of words in the receipt dated 23 December 1986, prepared by the tenant to record the payment of RM38,000 amount to forgery in law as to disentitle the tenant to rely on the receipt to support his contention that the tenancy had continued until 28 February 1990, and that he had the option to purchase the demised premises at the agreed price of RM500,000.

[23] It is the tenant's case that he made the first unrecorded payment of RM48,000 to the landlord as the commission or inducement to obtain the tenancy of the whole building and the closing of the air well, so that he, the tenant would acquire a bigger space with which he could sublet for better rents.

A **[24]** We have no reason to doubt the purpose of this payment as the landlord never questioned such a purpose in the first place as he had taken the stand that he never received such a payment at all, a stand that was disbelieved by the trial judge and which we endorse to have been correctly determined. This is so as the tenant had brought to court his relevant bank statement dated 28 February 1985 (D25) showing
B the sum had been paid out by way of a Bank Bumiputra Malaysia Berhad's cash cheque No 00110580 (D16A) and the tenant had also by letter dated 18 October 1985 (D26) requested his bankers to preserve the cheque. In his written judgment, the learned judge had to say about the payment of RM48,000:

C > In the result, I have to hold that Lee had lied when he said first in Megat's letter of 8 November 1985 (exh P32) that he had not received this RM48,000 and again on oath in his evidence in this court. In this context, it matters not if the cash was actually handed to Lee's father because such a receipt could only been on Lee's behalf.

D **[25]** As the learned judge had made a correct finding of fact on the evidence before him, we see no reason to disturb that finding.

[26] As for the second unrecorded payment of RM38,000, the landlord has admitted that he had received that sum from the tenant both in his reply dated
E 2 October 1987, and in his oral testimony. There is also the undisputed evidence that the tenant originally issued the landlord with a crossed Bank Bumiputra Malaysia Berhad (BBMB) cheque No 365512 dated 20 December 1986, for that amount (D14). The landlord did not bank in the cheque but instead saw the tenant on 24 December 1986, and exchanged the crossed cheque with a cash BBMB cheque No 365515 (D24A) as he needed the funds urgently.

F

[27] It is the tenant's case that with the payment of RM38,000 there was a tacit oral arrangement reached between him and the landlord that the tenancy was allowed to run for a further period of three years from 1 March 1987 to 28 February 1990, and during that period, he was also given the option to purchase the demised
G premises at the agreed price of RM500,000. That oral arrangement has since been documented in the receipt dated 23 December 1986, (D9) wherein particulars of the payment as well as its purpose are clearly set out and defined. The tenant goes further to say that he had already exercised the option to purchase on 7 February 1990, and as a token of his goodwill had tendered 10% of the purchase price to the landlord.

H

[28] In rebuttal, the landlord explained that the payment was to tide over the costs of covering the air well and other renovations to be done to the demised premises. He had never intended to renew the tenancy beyond 28 February 1987, and hence the notice to quit issued on 2 March 1987. Likewise he never intended to sell the
I demised premises and had returned the 10% deposit made by the tenant as he had never granted the tenant the option to purchase. As for D9, particulars of the payment of RM38,000 and what it stood for, were added well after the receipt was issued without his consent or knowledge. Since such entries were done unilaterally without his authority, the document is a forgery and the tenant cannot rely on it to support his counterclaim.

[29] From the oral and documentary evidence, it is clear that as at 24 December 1986, the landlord had received two unrecorded sums of money totaling RM86,000 over and above the sums due under the first and second agreement.

[30] What is the legal effect of these payments? The learned trial judge reached the following conclusion as regards the payment of RM48,000:

> The evidence here shows that the true position was that both Lee and Singam had reached a collateral agreement that this RM48,000 was an undercounter payment as a consideration for the first tenancy agreement. On 24 December 1984, Dr Singam got a receipt for RM6,000 deposit (P33). On 25 March 1985, he got a receipt RM5,000 (P36). If RM48,000 was above-board it is inconceivable that Dr Singam would not have insisted on 25 February 1985, that he be given a receipt for the RM48,000. The matter could have been referred to in the memorandum of 26 December 1984 or even the first tenancy agreement dated 25 February 1985, which Dr Singam had not yet signed. It was not. In court, Dr Singam admitted it was an off the record payment.

[31] Although the learned trial judge found that the RM48,000 was an undercounter payment, he did not proceed further to consider the legal implications of the tenant's conduct in tendering the money and the respondent's conduct in accepting it.

[32] There is a growing body of authority to say that such a payment allows the existence of a collateral agreement to exist side by side with the main agreement that it supplements or contradicts. In this appeal, the payment does not appear in the first or second agreement. A somewhat similar situation was found in *Tan Swee Hoe & Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16, a case also involving a tenancy dispute and which is generally considered as the leading authority on the matter. In that case, the appellants had orally agreed to allow the respondents to occupy the premises for as long as they wished upon payment of RM14,000 as tea money. Two written tenancy agreements were later executed by the parties but neither referred to the appellant's promise. A dispute arose between the parties and the appellants sued for vacant possession. In their defence, the respondents claimed that under the oral agreement, they were entitled to stay as long as they wished so long as they paid the rent regularly. On appeal, it was argued for the appellants that evidence of the oral promise could not be given in view of ss 91 and 92 of the Evidence Act 1950. That argument was overruled by Raja Azlan Shah CJ (Malaya) (as he then was) who held that the only way of overcoming ss 91 and 92 is by invoking the doctrine of collateral contract or collateral warranty as the 'device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead, it constitutes a separate contract which exists side by side with the main agreement.'

[33] If indeed there existed an oral agreement between the parties what in fact were the precise terms of that agreement? The answer lies in the purpose of the payment, namely the inducement to obtain the tenancy of the whole building and the closing up of the air well so that the tenant would acquire a bigger space with which he could sublet for better rents.

A **[34]** The tenant succeeded in securing the first term of the oral agreement as the whole building was leased to him. Whilst it is true that the landlord had breached the second term of the oral agreement in that he did not cover the air well, we consider that he cannot be faulted for the following undisputed reasons:

(i) He was not able to get the approval of the relevant authorities to effect such **B** renovations.

(ii) Despite that failure, he did, at the insistence of the tenant, attempt to renovate the demised premises, but following the complaints of the sub-tenants he was forced to stop such works.

C **[35]** Under these circumstances, we consider that no blame should be attached to the landlord and for this very reason nothing turns on the oral agreement as the landlord cannot be said to have breached any of the terms of such an agreement. In any event, the tenant is not relying on the payment of RM48,000 to support his counterclaim but on the second payment of RM38,000 which is evidenced by D9.

D

[36] D9 was prepared by the tenant wherein the landlord acknowledged receipt of a sum of RM9,000 being advance rentals for January and February 1987, at the rate of RM4,500 per month, paid to him by the tenant. That was as far as what D9 purported to say when the landlord signed on it. However, the tenant, without the **E** consent and knowledge of the landlord added the fact of the payment of RM38,000 into D9 as well as other details at the convenient spaces in D9 and for this very reason, the landlord challenged the legality of D9, to be a forgery. To appreciate this objection, I reproduce D9 showing the original statements at the time the landlord signed it and the unilateral entries made by the tenant:

F D9

Owner/Seller

Mr Lee Siew Leong

3, Lorong Timor

G Petaling Jaya

23 December 1986

Tenant/Buyer

H Dr ST Singam

15, Jalan 14/20

46100 Petaling Jaya

Re: Premises at 15, Jalan 14/20, 46100 Petaling Jaya

I Due to my breach of our lease dated 25 February 1985 and your advance payment of rental till 28 February 1990 I hereby give you this option to buy this premises at Five Hundred Thousand Ringgit. I Mr Lee Siew Leong I/C No2654131 (Landlord) also confirm receipt of rentals for the months of January 1987 and February 1987 via cheque No BBMB 365517 (Section 14) dated 23 December 1986 amounting to $9,000 (Nine Thousand Ringgit) at $4,500 Dollars per month (Four Thousand Five Hundred Ringgit per month).

This confirms full rental paid up to 28 February 9090 and the above option to buy over the premises is also extended till 28 February 1990. A

.....

Tenant's Signature

..... B

Landlord's Signature

[37] The highlighted words represent the entries made by the tenant after D9 was signed by the landlord on 23rd December, 1986. C

[38] The learned judge described the tenant's conduct in the following manner:

But he (the tenant) says the additions were necessary because after the words were typed (with which Lee agrees) the additional words were typed because Lee always changed his mind. In the case of D9 he said that three times the document was typed and taken out, put in and added to. This kind of evidence is especially bizarre when one considers that what these words were meant to reinforce at each stage was the same thing, ie three years rental and a three year option for RM38,000. D

E

[39] How does the law treat such a document?

[40] When a document or an instrument, on its production, appears to have been altered, it is the general rule that the party offering it in evidence must explain the alteration. Any material alteration in a written document or instrument, whether made by a party or a stranger is fatal to its validity, provided it was made after the document was executed and without the privity of the party to be effected by it and with the additional proviso that the alteration was made while the document was in the possession or in the control or the supervision of the party seeking to enforce it. As such, the law on the material alteration of a document or deed is well settled in that a party who has the custody of an instrument or document made for his benefit is bound to preserve it in its original state and any material alteration of it will vitiate the instrument, if it was done without the consent of the other party. F G

[41] As that had actually taken place in this case, the unilateral alteration in itself is sufficient to enable the landlord to treat D9 as being non-binding on him. H

[42] Added to this is the fact that the tenant made contradictory statements as to what the RM38,000 stood for. In his pleadings, he had maintained that it represented three years advanced rentals which works out to be RM1,055 rental per month. This monthly rental for the extended three year tenancy is far less than the RM4,500 monthly rental which the landlord had received during the currency of the first two year tenancy. It seems highly inconceivable that the landlord would settle for a monthly tenancy which is so much lesser than what he got from the original two year tenancy. This is so when the tenancy agreement had stipulated that the rentals for any extended period will be based on current market value. I

A **[43]** The tenant must have realized this for in his testimony he changed his story by stating that the RM38,000 represent six months advance rental for the renewed period.

B **[44]** In any event, the trial judge did not believe him and for good reasons and concluded that D9 had been forged by the tenant.

[45] Blackstone has defined forgery as 'the fraudulent making or alteration of a writing to the prejudice of another man's rights.' Forgery has also been explained in the following words:

C

> The false making or materially altering with intend to defraud of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of legal liability.

D **[46]** The existence of an intention to a fraud is essential to the crime of forgery although it is immaterial that no one was in fact deceived. A general intend to commit fraud is all that is required and it is not necessary to show that the offender intended to defraud any particular person.

E **[47]** Forgery, in *Tomlin's Law Dictionary* has been explained as 'a false making of any written instrument for the purpose of fraud or deceit, including every alteration of or addition to the true instrument.'

F **[48]** The tenant relies on D9 to support his counterclaim, the very same instrument on which he had unashamedly admitted he had added words without the knowledge and consent of the landlord and which have been proven to contain false information. For that very reason, we see no reason to interfere with the trial judge's finding that D9 had been forged by the tenant and therefore cannot be relied upon as the foundation of his counterclaim.

G **[49]** Finally, we come to the objection of the admission of the two notices to quit issued by the landlord's solicitors. Paragraph 4 of the statement of claim pleads the first notice to quit dated 2 March 1987, as the foundation of the landlord's claim for vacant possession and it is this notice to quit that is relevant for the purposes of the remedies sought for by the tenant.

H

[50] Although both parties have been represented by solicitors from the very inception of the proceedings, there is a lot to be desired insofar as the pleadings go and it is no wonder that the hearings dragged for 21 days. As parties are bound by their pleadings they cannot be heard to object when proceedings are allowed to drag

I by the admission of evidence for which no objection had been taken by any of the parties at the hearing of the suit.

[51] As there is no objection to the award of damages made by the court below and that the trial judge's finding on liability is hereby confirmed, this appeal must fail,

and accordingly it is dismissed with costs and the deposit is to be paid out to the landlord/respondent to account of his taxed costs.

Appeal dismissed.

Reported by Sally Kee